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No. 380

In the Supreme Court of the United States

OCTOBER TERM, 1960

HAZEL T. ELLIS, PETITIONER

v.

FREDERICK H. MUELLER, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 9) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10) was entered on June 23, 1960. The petition for a writ of certiorari was filed on September 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the action of the authorized administrative officer within the Department of Commerce, in preferring agency charges (based on a departmental investigation) against an employee of that Department and subsequently deciding whether the employee's reply is satisfactory, violates the provisions of the Veterans' Preference Act of 1944, or the Civil Service Commission regulations.

STATUTES, REGULATIONS, AND ORDERS INVOLVED

The Veterans' Preference Act of 1944, 5 U.S.C. 863, reads in pertinent part as follows (as it appears in the United States Code):

> § 863 Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.
>
> No permanent or indefinite preference eligible * * * shall be discharged * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge * * * is sought shall have at least thirty days' advance written notice * * *, stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision; Provided, That

> such preference eligible shall have the right to make a personal appearance * * * in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission * * *.[1]

The pertinent provisions of Department of Commerce Administrative Order No. 4 (amended), dated May 9, 1956 (Subject—Office of Personnel Management), and Order No. 202-1 (amended), dated October 23, 1956 (Subject—Delegation of Authority for Personnel Management), are printed in the Joint Appendix (drawn up in the court below and filed here) at pp. 41 and 44, respectively.

STATEMENT

At the time of her dismissal in March 1957, the petitioner was employed by the Department of Commerce as an Economic Analyst in the Bureau of Foreign Commerce. Prior thereto, on December 7, 1956, she had related to Thomas R. Wilson, Special Assistant to the Assistant Secretary of Commerce, certain statements which she attributed to Thomas H. Peters, her immediate supervisor (R. 18-19). Pending a complete investigation of the truth or falsity of these alleged remarks, Peters' departure for a foreign service assignment was postponed from December 7, 1956, to January 14, 1957 (R. 18-19). In the interim, an

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[1] Civil Service Commission regulations providing for notice, opportunity to reply, notification of adverse agency action, and right to a Commission hearing, are set forth in 5 C.F.R. 22.201-22.205. Commission regulations providing for a hearing, introduction of evidence, attendance and examination of witnesses, etc. and Commission appellate proceedings are found in 5 C.F.R. 22.501-22.607.

investigation was conducted at the direction of Joseph M. Kelly, Deputy Security Control Officer, Department of Commerce, by departmental investigators (R. 16-17). During this inquiry, petitioner and other departmental employees were interviewed in an effort to fully develop the facts and circumstances surrounding the statements allegedly made by Peters (R. 17). During petitioner's interview she related to the investigators many additional remarks which she similarly attributed to Peters. In each instance these (as well as the accusations which triggered the investigation) were of such a nature, that, if in fact they had been made by Peters, serious questions of his loyalty, as well as his suitability for continued public service, would arise.[2]

Upon conclusion of this investigation and consideration of the results, it was determined that the petitioner's accusations were either false or unwarranted, and consequently on February 20, 1957, a statement of charges was served upon her, signed by Mrs. Catherine S. Lott, Chief of the Personnel Operations Division, Department of Commerce, notifying peti-

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[2] For example, petitioner told Wilson on December 7, 1956, that Peters had stated "it 'would be a good thing' if Egypt went Communist and if the Union of Soviet Socialist Republics could establish itself in a strong position in the Middle East" and on January 3, 1957, petitioner informed Commerce Department investigators that Peters had stated, *inter alia*, that President "Nasser should use his influence to persuade all the countries in that geographic vicinity, such as Iraq, Syria, Iran, etc., to blow up all the Western oil pipe lines in retaliation against the British invasion of the Suez area" (R. 18-19). At this time Peters' temporarily suspended assignment was in Cairo, Egypt.

tioner that the Department proposed to remove her from the service (R. 18-20). This notice informed her specifically of the statements found to be false or unwarranted and of her right to reply personally and in writing to these charges and to submit affidavits in support of her reply.

On February 27, 1957, petitioner requested and was granted an extension of time to respond and on March 15, 1957, she replied and, *inter alia*, entered a general denial to the falsity of the statements made by her (R. 21-25).

After consideration of petitioner's reply, she was notified by letter from Mrs. Lott, dated March 22, 1957, that since she had not demonstrated either that she had not made these statements concerning Peters, or, if she had, that they were true, her reply was unsatisfactory and accordingly she would be dismissed effective March 29, 1957 (R. 21-25). This notice additionally informed petitioner of her right to appeal this decision to a designated official within the Department of Commerce or, as one entitled to veterans' preference, to the Civil Service Commission under the Veterans' Preference Act of 1944 (Section 14, 5 U.S.C. 863).

On March 27, 1957, petitioner pursued her appeal directly to the Civil Service Commission. After an independent investigation by the Commission,[3] the complete results of which were available to both parties, hearings commenced on petitioner's appeal on June 11, 1957, and continued intermittently until

[3] See 5 C.F.R. 22.401.

July 3, 1957 (R. 27). On November 21, 1958, after considering the entire record, the Commission's Appeals Examining Office concluded that, on the evidence, it appeared that petitioner had a motive to injure Peters and, secondly, that he had not made the statements attributed to him by the petitioner (R. 39). Consequently, her discharge by the Department of Commerce was upheld (R. 27-40). This decision was sustained by the Commission's Board of Appeals and Review on June 8, 1959 (R. 42-43).

Petitioner's complaint was filed in the district court on August 7, 1959 (R. 1), and respondents' answer on October 7, 1959 (R. 10). On December 12, 1959, the district court granted summary judgment for respondents, dismissing the complaint, and observing in a memorandum opinion (R. 25):

> The limited judicial review permissible to this Court does not embrace an inquiry into the truth or falsity of the charges on which the plaintiff as an executive employee was removed by an executive official.
>
> The record indicates that no procedural rights of the plaintiff have been denied. This being so, the function of the Court is exhausted. * * *

On June 23, 1960, the court of appeals affirmed the district court's disposition of the case, similarly finding that petitioner had been accorded all procedural rights due her (Pet. 9-10).

ARGUMENT

The sole contention raised by the petition is that the petitioner was unfairly and improperly removed

from her position as a government employee because Mrs. Lott, the administrative officer who formally filed the letter of charges (based on a Commerce Department investigation), also decided that the petitioner's answer to the charges, in the light of all the circumstances, warranted her dismissal from government service. The argument is not only without merit, but it completely ignores the fact that, following petitioner's dismissal by the Department of Commerce, she received a hearing, as a veterans' preference eligible, before the Civil Service Commission,[3] at which witnesses were cross-examined by her.[4]

Petitioner's procedural rights, as a veterans' preference eligible, were governed by the Veterans' Preference Act of 1944. *Cole* v. *Young*, 351 U.S. 536. That statute and the regulations under it require that a specific written statement of charges be served and that the employee affected be allowed a reasonable opportunity to submit a full and complete reply personally as well as in writing. They do not require that the employee be afforded judicial or quasi-judicial proceedings within the agency prior to dismissal.

The principle advanced by petitioner, that the due process clause of the Fifth Amendment demands a rigid separation of prosecuting and adjudicatory functions, does not apply to procedures for removal

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[3] Mrs. Lott, of course, took no part in the proceedings before the Civil Service Commission.

[4] In accord with procedures established and set forth at 5 C.F.R. 22.301-22.607.

of federal employees. This is attested by the long history of such procedures, as well as by the accepted practice (within the agencies) under the Lloyd-La Follette and Veterans' Preference Acts. The authorities cited by petitioner are not opposed to this position. In each instance in which the court in those cases found a lack of fair procedure it did so where the power being exercised was essentially judicial and the proceedings were clearly of a quasi-judicial nature, not purely executive as here. In *Stockwell* v. *Township Board of White Lake*, 22 Mich. 341, 345 (Pet. 7), the court stated that this principle asserts itself "whereever *judicial* powers are employed by a body appointed by law" (emphasis added). Cf. *Metsker* v. *Whitesell*, 103 N.E. 1078; *State ex rel. Miller* v. *Aldridge*, 103 So. 835, 39 A.L.R. 1470. In the remaining authorities cited by petitioner, the court found a lack of fair procedure due to bias, prejudice, or personal interest. Such cases have no application here for, as the record indicates, Mrs. Lott's participation in the agency proceedings was completely impersonal and in fact she had no official knowledge of the matter until the investigation had been completed and the results turned over to her, as the authorized personnel officer, for evaluation.

Petitioner's reliance on *Greene* v. *McElroy*, 360 U.S. 474, is similarly misplaced. There this Court found that the Department of Defense had not been authorized to create an industrial security clearance program under which the procedural safeguards of confrontation and cross-examination were denied Greene during his hearing. Here, no such question

is presented, for the statute and regulations prescribing petitioner's rights are explicit and do not provide for such proceedings within the agency. However, the record is clear that in her subsequent hearing before the Civil Service Commission petitioner was afforded and made extensive use of these "traditional safeguards".

In sum, it is plain that the procedures employed by the Department of Commerce in effecting petitioner's dismissal were in accordance with her rights under the Veterans' Preference Act of 1944 and the applicable Civil Service Commission regulations. The decision of the court of appeals was clearly correct and does not call for further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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